Office Supreme Court
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No. 85-36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL CEASAR,

Petitioner,

—against—

MERRILL LYNCH & CO., INC., ROGER E. BIRK, DAKIN B. FERRIS and WILLIAM A. SCHREYER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner is a purchaser of the stock of Merrill Lynch & Co., Inc. His attempt to conjure up a securities fraud claim by repackaging unrelated *other* complaints against respondents ("Merrill Lynch") was rejected by the courts below after petitioner was afforded ample opportunity to present all materials claimed to support his allegations. Those materials established that he had no claim at all.

The courts below merely applied well-settled legal principles in reaching their conclusion. The court of appeals found the issue so clear that it affirmed unanimously by a three paragraph statement that does not constitute a formal opinion and

may not be officially reported or even cited in unrelated cases. Plainly, this case raises no significant issues, and the decisions below have no broad-ranging effect. Simply stated, there are no "special and important reasons" for granting a writ of certiorari in this action. Sup. Ct. Rule 17.

COUNTERSTATEMENT OF QUESTION PRESENTED

Was a grant of summary judgment proper where the undisputed record showed (a) that the misrepresentations alleged were in fact accurate when made and that the matters allegedly omitted would at most have been unwarranted predictions, impossible to make at the time and uncertain even now; and (b) that petitioner did not purchase in reliance on market conditions, which, in any event, were not artificially inflated as he alleged?

COUNTERSTATEMENT OF THE CASE

Petitioner, a purchaser of Merrill Lynch stock, brought this purported securities fraud action alleging that respondents had artificially inflated the market in which he purchased by making misrepresentations and omissions in certain Merrill Lynch quarterly reports. He claimed that the misrepresentations and omissions concerned Merrill Lynch's purported liability to purchasers of insurance products known as single premium deferred annuities ("SPDAs") issued by a subsidiary of Baldwin-United Corporation ("Baldwin") and sold through Merrill Lynch affiliates, as well as other problems resulting in Baldwin's financial collapse. Converting respondent's challenge to petitioner's pleading into one for summary judgment, the district court invited petitioner to come forward with any materials by which he could show a genuine factual issue to support his claim.

The materials petitioner offered, however, demonstrated that the alleged misrepresentations were not misrepresentations at

all; that the alleged omissions were, at best, mere predictions of events concerning an unrelated company outside the control of Merrill Lynch; that the events he claimed Merrill Lynch should have predicted in April 1983 are uncertain to occur even now; and that in purchasing his stock in the first instance, petitioner did not rely on artificially inflated market conditions at all, but rather believed that the market for Merrill Lynch stock was "undervalued."

On the undisputed record, the district court concluded, and the court of appeals agreed, that petitioner's claim was no more than a classic instance of "fraud by hindsight," and that, consequently, the enormous expenditure entailed in the discovery "fishing expedition" that petitioner had requested was not justified. Summary judgment accordingly was granted for respondents.

In order to clarify the context and basis of petitioner's suit, which the instant petition for certiorari distorts, a brief summary of the background and procedural posture of the action follows.

(a) Background

Petitioner purchased Merrill Lynch stock on three separate occasions from July to September, 1983 (A-30), the last at a time he believed Merrill Lynch stock to be "undervalued." During that period, the market in Merrill Lynch stock was declining consistently and rapidly; petitioner's third purchase was made at a price drop of 30% from that of his first.

The decline in Merrill Lynch stock paralleled a decline in the price of securities of other nationwide brokerage companies. According to petitioner's own securities expert, it reflected the market's reaction to the news that Baldwin and its insurance subsidiaries were suffering financial difficulties, resulting in the July 1983 commencement of rehabilitation proceedings against Baldwin's insurance subsidiaries, Baldwin's September 1983 entry into reorganization proceedings, and the consequent

filing of suits by SPDA holders against Merrill Lynch and other brokers.

In January 1984, Merrill Lynch announced that it had set aside a reserve fund of approximately $154 million, approximately 40% of which covered the obligations owed Merrill Lynch by Baldwin (A-65-66), and approximately $88 million of which was in connection with, *inter alia*, Merrill Lynch's simultaneously-announced proposal to enhance the provisions of the rehabilitation plan for the Baldwin insurance subsidiaries, thereby helping its customers who were SPDA purchasers even though it had no legal obligation to do so (A-66). To this day, Merrill Lynch has not been found liable in any way to SPDA holders whose contract rights continue to be protected by the rehabilitation plan for the Baldwin insurance subsidiaries.

Nevertheless, petitioner attempted to reshape the assertions made in the SPDA holder suits into a claim of his own. He charged that respondents had made misstatements concerning Baldwin's financial problems and respondents' liability to SPDA holders in an April 1983 statement by Roger Birk, Merrill Lynch's then-Chairman, that "Merrill Lynch was 'prepared to live and thrive whatever the rules [governing the financial business]' " (A-58) and in Merrill Lynch's 1983 First and Second Quarter Reports. The latter, he claimed, reported broad based strength in most areas of Merrill Lynch's business without qualification in the annuity area (A-58-62).

As reported in both the *Wall Street Journal* and in Merrill Lynch's 1983 First Quarter Report, the "live and thrive" statement by Roger Birk had absolutely no relevance to petitioner's claim. It was part of a lengthy speech addressed solely to the increasing competition in the financial services area as a result of commercial banks entering the securities business, to pending legislation that would further increase that competition, and to Merrill Lynch's strategy to succeed in that environment. The statements of earnings in the First and Second Quarter Reports likewise failed to support petitioner's claim.

They specifically noted a substantial decline in Merrill Lynch's annuity sales during the relevant quarters, just a few paragraphs below the language cited by petitioner (A-58-62). Indeed, the record is devoid of any evidence suggesting that the statements were inaccurate in any respect.

Petitioner also contended that Merrill Lynch knew but fraudulently failed to disclose in those quarterly reports that Baldwin SPDA holders would lose their contract rights, that Merrill Lynch ultimately would be held liable to Baldwin SPDA holders, and that Baldwin's own financial status would adversely impact Merrill Lynch because Baldwin could not repay obligations incurred in connection with its 1981 purchase of a Merrill Lynch company (A-62-63). The extent to which any of those events may occur, however, is unclear even today and their prediction two years ago not only would have been impossible but irresponsible.

(b) Proceedings Below

On April 20, 1984, Merrill Lynch moved to dismiss petitioner's complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim and to plead fraud with the requisite particularity. By order dated July 27, 1984, the district court stated its intention to treat the motion as one for summary judgment and established a schedule to give "all parties reasonable opportunity to present all material made pertinent to such a motion by Rule 56" (A-1-3).

After petitioner filed an Amended Complaint on August 15, 1984 (A-24-72) in an attempt to moot respondents' motion, he served a broad-ranging document request and deposition notice. By order dated September 20, 1984, the requested discovery was stayed pending disposition of the motion, with the court "reserv[ing] the right to permit discovery in the future if, after plaintiff has submitted papers opposing the motion, such discovery should appear appropriate" (A-4-5).

By Memorandum and Order dated October 10, 1984, the district court granted summary judgment for respondents and dismissed the action (A-6-8). On November 9, 1984, it denied petitioner's motion for "reargument or reconsideration and clarification" and reaffirmed its October 10, 1984 order:

> Upon examining all papers submitted, we find that the motion for summary judgment should be granted. This is essentially an action for "fraud by hindsight". The papers submitted do not suggest any reasonable basis for believing that defendants made material misstatements or omissions of fact concerning Merrill Lynch's financial prospects with knowledge or reckless disregard of the possibility that such would be misleading. To permit plaintiff to engage in discovery would be to permit a "fishing expedition" at enormous expense to the defendants.

(A-13).

The Second Circuit unanimously affirmed following its "careful review of the documentary evidence adduced below" (A-21). That court agreed both with the district court's characterization of petitioner's claim as one for "fraud by hindsight" (A-21-22), and its conclusion that no material issues of fact were raised by the record: "[e]ven assuming all factual questions were resolved in Ceasar's favor, we do not believe his claim was viable" (A-22). The court of appeals also agreed that petitioner was not entitled to discovery because his "conclusory allegations did not exceed [the] minimum standard" necessary to make out a *prima facie* claim (A-22-23).

REASONS FOR DENYING CERTIORARI

I.

ISSUES CONCERNING RULE 9(b) ARE IRRELEVANT TO THE DECISION BELOW

The principal reasons supporting the petition for certiorari concern purported distinctions in language used by the various circuits in applying Rule 9(b) of the Federal Rules of Civil Procedure (Petition at 23-40). Whether or not such subtle differences constitute a "split of authority" is certainly far from clear.[1] What is evident, however, is that neither the construction nor application of Rule 9(b) is now relevant to this action.

Although respondents originally moved against petitioner's complaint on grounds, *inter alia*, of noncompliance with Rule 9(b), the district court converted that motion into one for summary judgment (A-1-3), recognizing that it was

> based in part upon Rule 12(b)(6), dealing with the defense of failure to state a claim upon which relief can be granted. Since the parties have presented matters outside the pleadings, we will, pursuant to Rule 12(b), treat this as a motion for summary judgment under Rule 56, and give

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1 Contrary to petitioner's suggestion (Petition at 24-25), the decision of the United States Court of Appeals for the Second Circuit in *Denny* v. *Barber*, 576 F.2d 465 (2d Cir. 1978) has been recognized by numerous courts in other circuits as a leading case on the general pleading requirements and policies under Rule (9)b. *See e.g.*, *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mutual Life Insurance Co.*, 698 F.2d 320, 324 (7th Cir. 1983); *Blanes* v. *Paine Webber Jackson & Curtis, Inc.*, 593 F. Supp. 458, 461 (D.P.R. 1983); *In re Ramada Inns Securities Litigation*, 550 F. Supp. 1127, 1132 (D. Del. 1982); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Del Valle*, 528 F. Supp. 147, 149 (S.D. Fla. 1981); *McFarland* v. *Memorex Corp.*, 493 F. Supp. 631, 656 (N.D. Cal. 1980); *Shapiro* v. *Miami Oil Producers, Inc.*, 84 F.R.D. 234, 236 (D. Mass. 1979).

> all parties reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(A-2).

After petitioner filed his amended complaint, respondents moved against that pleading pursuant to the above order. The parties subsequently introduced hundreds of pages of exhibits and several affidavits. Both courts below reviewed and considered all of the extra-pleaded submissions, as is proper on a summary judgment motion, and did not limit themselves to the allegations in the complaint (A-13, 21). They then applied basic and well-settled legal principles in ruling that petitioner had failed to raise a genuine factual issue and that his claim was invalid as a matter of law (A-12-13, 21-22). See Point II, *infra*. Their rulings did not address the sufficiency of the pleading under Rule 9(b) in that it was no longer an issue.

Accordingly, petitioner's request that this Court determine, in the abstract, whether a split of authority among the circuits exists as to Rule 9(b) and the proper standards governing that rule's construction would be a needless expenditure of this Court's resources. The courts below simply did not decide this case on that basis. The petition for a writ of certiorari should be denied.

II.

THE COURT BELOW APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES IN CONCLUDING THAT PETITIONERS HAD NO CLAIM FOR SECURITIES FRAUD

Petitioner does not point to a single unique or important issue that was resolved below, let alone one that would justify this Court's attention. As shown, he merely challenges the lower courts' application of well-established legal principles in ruling in favor of respondents.[2]

As this Court has recognized, when a party opposes a motion for summary judgment, at the very least "sufficient evidence supporting the claimed factual dispute [must] be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968). *See also* Fed. R. Civ. P. 56(e). In determining the sufficiency of that evidence, moreover, the record is to be reviewed in the light most favorable to the party opposing the motion (A-21-22). 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.15[3] at 56-469 (2d ed. 1985). The courts below did nothing more than properly apply these settled principles. Contrary to petitioner's contention that the court below wrongfully drew inferences from the evidence in ruling for respondents (Petition at 42), the court specifically found that even if "all factual questions were resolved in Ceasar's favor," his claim was not viable (A-22).

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2 Petitioner's references (Petition at 41, 43) to this Court's decision in *Hishon* v. *King & Spalding*, 104 S. Ct. 2229, 2233 (1984) are inapposite. That case set forth the standard to be applied in reviewing motions to dismiss based solely on the pleadings. Here, however, evidence was offered by plaintiff supplementing and contradicting the allegations in the amended complaint; thus, those allegations were no longer the guideline for whether a genuine issue of material fact existed. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-89 (1968).

Petitioner's claim was based on Merrill Lynch's alleged failure publicly to predict in April 1983 that it ultimately would be liable to holders of SPDAs issued by Baldwin subsidiaries and that Baldwin's own financial status would adversely impact Merrill Lynch as one of its creditors. Those predictions would have been impossible then and are unclear even now, two years later.

In view of this, the Second Circuit properly agreed with the district court that petitioner's claim was merely one for "fraud by hindsight," which the Second Circuit had previously held was not actionable in federal securities fraud. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978). In that case, the Second Circuit had noted:

> there . . . must be more than vague allegations that, as shown by subsequent developments, the corporation's true financial picture was not so bright in some respects as its annual reports had painted and that the defendants knew, or were reckless in failing to know, this.

Id. Petitioner has cited no case which rejected the holding in *Denny* v. *Barber, supra*, and our research likewise has uncovered no such decision.

Moreover, the record below negated the existence of a securities fraud claim on other grounds as well. The 1983 financial reports and statement of Merrill Lynch's then-chairman contained no "prophecy" of Merrill Lynch's future profits or earnings; they did not relate to future events in that respect at all. Nor was the market in Merrill Lynch stock during the period in issue artificially inflated. Petitioner's own expert acknowledged the decline in the price of Merrill Lynch stock and attributed it, not to the suppression of information regarding Baldwin's financial difficulties and their effect on Merrill Lynch, but rather to public awareness of precisely these events.

In view of the record, and petitioner's failure to come forward with any support for a claim *prima facie*, the court's further decision below to refuse to permit petitioner broad-ranging discovery was plainly correct. This Court has admonished that to the extent discovery

> permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). Such was the case here.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition for Writ of Certiorari should be denied.

Dated: July 29, 1985

Respectfully submitted,

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